87-1077

NO. _____

DUPLICATE
Supreme Court, U.S.
FILED
DEC 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRIAN MILLANG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

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December 24, 1987

10/87

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER AN OFF-DUTY SERVICE MEMBER, AT A NON-MILITARY PICNIC, IS BARRED BY THE FERES DOCTRINE FROM SUING THE UNITED STATES UNDER THE F.T.C.A. FOR INJURIES SUSTAINED IN THE COURSE OF RESCUING AN 18-MONTH OLD CHILD ENDANGERED BY THE NEGLIGENCE OF AN ON-DUTY MILITARY POLICEMAN WHO WAS NOT ON A MILITARY MISSION NOR OTHERWISE EXERCISING COMMAND AUTHORITY, AND WHERE NO EFFECT ON MILITARY DISCIPLINE BY ALLOWING SUIT IS A REASONABLE EXPECTANCY.

2. WHETHER THE RULE OF UNITED STATES v. SHEARER, 473 U.S. 52 (1985) IS CONTRAVINED BY THE NINTH CIRCUIT IN THIS CASE. THAT CASE HERETOFORE HELD THAT THE APPLICATION OF "INCIDENT TO SERVICE" TEST OF FERES IS TO BE MEASURED BY THE STATUS OF PLAINTIFF AS DISTINGUISHED FROM THAT OF THE TORTFEASOR, AND THAT THE

EFFECT ON MILITARY DISCIPLINE, WHICH FERES WAS INTENDED TO PRESERVE, IS THE OVER-ALL POLICY TO BE APPLIED, AND THEN ON A CASE-BY-CASE BASIS.

3. DID THIS COURT IN UNITED STATES v. JOHNSON, 107 S.Ct. 2063 (May 18, 1987) INTEND TO HOLD THAT UNDER NO CIRCUMSTANCES COULD OUR SERVICE PEOPLE RECOVER UNDER THE F.T.C.A., AND MORE PARTICULARLY ABANDON THE "INCIDENT TO SERVICE" TEST OF FERES WHICH HAS BEEN THE TEST FOR OVER 40 YEARS?

LIST OF PARTIES

The parties in the proceedings below were Petitioner, BRIAN MILLANG, and Respondent, UNITED STATES OF AMERICA.

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28 U.S.C. 1346(b)
Section 2671

OPINIONS AND JUDGMENT BELOW

Petitioner, BRIAN MILLANG, filed suit under the F.T.C.A. against the United States for injuries received on Saturday, July 25, 1981 at a picnic area located in a park on the Marine Corps Air Station, Tustin, California.

The case was tried without jury in the United States District Court, Central District of California, the Honorable Mariana R. Pfaelzer, United States District Judge, presiding.

At the conclusion of the trial, the District Court determined that the proximate cause of the Petitioner's injuries was the negligence of an on-duty military policeman, for which the Government, if it were a private citizen,

would be responsible under California Law.[1/]

Judgment was entered against the United States and damages were awarded to Petitioner in the sum of $1,083,896 on November 15, 1985.[2/]

On January 16, 1986, Respondent United States of America filed a Notice of Appeal from the Judgment.

On May 14, 1987, the Ninth Circuit Court of Appeals reversed the Judgment of the District Court.[3/]

1/ The Court's Findings of Fact and Conclusions of Law is reproduced as Appendix "A", Infra, A. 1 to A. 12.

2/ The Judgment is reproduced as Appendix "B", Infra, A. 13 to A. 14.

3/ The Opinion of the Ninth Circuit is reproduced as Appendix "C", Infra, A. 15 to A. 26.

Thereafter, Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, Rules 40 and 35, F.R.A.P., respectively.[4/]

On September 10, 1987, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.[5/]

4/ The Petition for Rehearing is reproduced as Appendix "D", Infra, A. 27 to A. 50.

5/ The Order is reproduced as Appendix "E", Infra, A. 51.

JURISDICTION

The decision of the Ninth Circuit was issued on May 14, 1987. Thereafter the Ninth Circuit, by order filed September 10, 1987, denied BRIAN MILLANG's Petition for Rehearing and rejected the suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) for Review by a Writ of Certiorari.

STATUTES INVOLVED

This case involves the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§2671, et seq. The relevant portions thereof, §§2671, 2674 and 2680 are reproduced in Appendix "F", Infra, A. 52 through A. 70

STATEMENT OF THE CASE

BRIAN MILLANG's injuries were the result of the negligent operation of a motor vehicle (A. 7) by an on-duty military policeman (A. 2) not on a military mission at the time and place of the accident. The District Court did not consider nor was it required to evaluate military decisions (A. 6-7). Nor was any evidence introduced that the command function of the military was involved or impeded by the application of the F.T.C.A. (A. 6).

On Saturday, July 25, 1981, at a picnic area located in a park on the Marine Corps Air Station, Tustin, California, BRIAN MILLANG was run over and injured by a military police vehicle (A. 2-3). At the time of the accident, BRIAN MILLANG was an off-duty M.P. attending a picnic during his leisure time (A. 1).

The picnic was located at a park which contained a non-military recreational vehicle overnight parking area (A. 2) and was near a cornfield (A. 2).

The picnic was attended by other servicemen with whom Petitioner was friendly, their wives, children and guests. It was an informal gathering which included picnic games, food, soft drinks and beer. The picnic was not a military operation, and attendance at it was not incident to nor required by the military service. It was a friendly gathering. The food and drinks were purchased at an off-base market with money "chipped in" by some of the picnickers (A. 3).

At approximately 4:00 P.M. on the day of the accident an on-duty military police officer, Sgt. Carlo Troiani, drove to the picnic area (A. 2).

No evidence was offered by the Government that Sgt. Troiani was dispatched or otherwise summoned to the picnic. In fact, the evidence at trial was that Sgt. Troiani was talking to friends and involved in "playful" conduct when the accident occurred.

Upon arriving at the area Sgt. Troiani got out of the vehicle, leaving the engine running. The vehicle was a 3/4 ton pick-up truck (A. 2).

While Sgt. Troiani was out of his truck an 18-month old child, Danny Myers, son of Sgt. Douglas W. Myers, walked in front of Sgt. Troiani's military vehicle (A. 2-3). At that time Petitioner noticed Danny Myers in front of Sgt. Troiani's truck. He moved to the place where Danny Myers was playing (A. 2). At or about the same time some of the other picnickers gathered around Sgt. Troiani's truck (A. 3).

Thereafter, one of the picnickers (not BRIAN MILLANG) gestured as if to spray Sgt. Troiani's truck with beer. In response Sgt. Troiani hurriedly got into his truck, put it into gear and accelerated forward (A. 3). The evidence at trial was that no aggressive or disorderly conduct was involved. The picnickers were "joking around."

BRIAN MILLANG, sensing the movement of the vehicle and without regard for his own safety, threw Danny Myers clear of the front of the pick-up truck (A. 3). The child was unharmed. The right front of the vehicle collided with BRIAN MILLANG and the right side tires ran over the side of his body causing severe injuries (A. 3-4).

At trial the Government called no witnesses and offered no evidence whatsoever concerning any of the issues

involved in this case, including the question of whether military discipline or command decisions were involved. The Government's failure to do so was because this was a simple traffic accident. Such military considerations were not involved and the District Court so found.

At the conclusion of the trial, the District Court determined that the proximate cause of Petitioner's accident was the negligence of Sgt. Troiani for which the Government, if it were a private citizen, would be responsible under California law (A. 8).

The District Court also made the following Conclusions of Law, all of which were uncontradicted by the evidence:

A. The Doctrine enunciated in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950) does not apply to the

present case. Plaintiff's attendance at the picnic was not an activity incident to military service nor did it involve the command functions of the military service. These functions were not involved in the picnic nor was Plaintiff's conduct in saving the life of the 18-month old Danny Myers incident to his military duties (A. 9).

B. The finding of negligence of the Government in this case does not require the District Court to consider or evaluate any military decision. This was a traffic accident involving the negligent operation of a motor vehicle. Resolution of the liability issue did not require officers to testify in Court as to each others decisions and actions (A. 10).

C. The negligence in this case occurred at a picnic held at a park attended by off-duty members of the

military with their wives, children, friends and guests. Plaintiff's activities at the picnic were not related to his military duties (A. 11).

D. The park was open to wives, children and to non-military invitees. Plaintiff would have been allowed to attend the picnic at this location even if he were not in the military. In any event, the situs of the place of the accident is not controlling. (Citing U.S. v. Shearer, 473 U.S. 52, 105 S.Ct. 3039 [June, 1985]) (A. 11).

E. At the time of the Government's negligence, Plaintiff was not acting pursuant to military orders. His activities bore no relationship to military activity. As such, this suit does not "second guess" command decisions; it does not encourage military personnel to question decisions of their superiors

nor does it encourage military personnel to fail or refuse to follow orders (A. 11).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT HAS APPLIED THE FERES DOCTRINE IN THIS CASE IN A MANNER WHICH CONFLICTS WITH AND MISINTERPRETS THIS COURT'S DECISION IN THE CASE OF UNITED STATES v. SHEARER, 473 U.S. 52, 105 S.CT 3030 (1985), AND IN THE INTERPRETATION OF THAT CASE BY THE ELEVENTH AND SECOND CIRCUITS

The crux of the Ninth Circuit's decision is the misapplication of this Court's decision in the case of United States v. Shearer, supra. wherein the Ninth Circuit states in its Opinion:

> "Feres prohibits not only those suits that directly call into question military decisions, but also are 'the type of claims the if generally permitted,

would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.' Shearer, 105 S.Ct. at 3044 (Emphasis in original.)" (A. 22).

The Ninth Circuit then concluded without authority or explanation:

"Although MILLANG does not specifically challenge a military decision in this case, a claim that an on-duty soldier acted negligently while discharging his responsibilities in an area subject to military control is the type of claim that could well call military decisions into question." (A. 23).

This is contrary to this Court's decision in Shearer, which requires a case-by-case approach. (105 S.Ct. at 3043.) Moreover, the Ninth Circuit's decision, if allowed to stand, would make it impossible for a service member to bring suit because every conceivable case involving a service member "could will call military decisions into question," no matter how remote the possibility. However, the F.T.C.A. does not preclude a service member from bringing suit against the Federal Government (28 USC 1346(b), 2671 [1976]).

* * *

This Court held in Feres v. United States, 240 U.S. 135 (1950), that a soldier may not recover under the Federal Tort Claim Act for injuries which "arise out of or are in the course of activity incident to service." Ibid, at 146.

The definition of what constitutes activity "incident to service" has never been specifically addressed by this Court. However, it has been explained that "the incident to service" exception is best explained by the disciplinary rationale. (See: United States v. Muniz, 374 U.S. 150 [1963]; United States v. Brown, 348 U.S. 110 [1954]; Hunt v. United States, 636 F.2d 580 [D.C. Cir. 1980]; Johnson v. United States, 704 F.2d 1431 [9th Cir. 1983].

> "[T]he protection of military discipline . . . serves largely if not exclusively as the predicate for the underlying Feres doctrine. Although the [Supreme] Court has woven a tangled web in its discussion of the 'distinctly Federal' notion that of the alternative compensation system, it has not wavered on the importance of maintaining discipline

within the Armed Forces. The Court has found it unseemingly to have military personnel, injured incident to their service, asserting claims that question the propriety of decisions on conduct by fellow members of the Military. Only this factor can truly explain the underlying Feres doctrine and the crucial line it draws . . ." Monaco v. United States, 1661 F.2d 129, 132 [9th Circuit, 1981] (Quoting Hunt v. United States, 636 F.2d 580, 599 [D.C. Circuit 1980]. Cert. Denied 456 U.S. 989 (1982).[6/]

In United States v. Shearer, supra, this Court has confirmed that the overriding concerns of the doctrine are

---

6/ See Also Johnson v. United States, 704 F.2d 1431, 1436 [9th Circuit, 1983] in which it was stated that safeguarding Military discipline is a fundamental rational for immunity.

with the effect of a tort suit and second guessing of military decisions or in the impairment of military discipline. (105 S.Ct. at 3043), and that the other factors enumerated in Feres no longer are controlling. (Ibid at 3043, N. 4).

As such, the Feres doctrine bars suit only where a civilian court would be called upon second-guess military decisions or where the plaintiff's admitted activities are of the sort that would directly implicate the need to safe-guard military discipline. (See: Johnson v. United States, 704 F.2d at 1436.)

* * *

The significant import of the Shearer decision, however, is:

"The Feres Doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the Statute as it has been construed in Feres and subsequent cases." (105 S.Ct. at 3043.)

As such, in Shearer this Court confirmed that courts should take a case-by-case, rather than per se, approach to claims of immunity.

This interpretation of Shearer has been confirmed by the Eleventh Circuit in Stanley v. United States, 786 F.2d 1490, 1499 (11th Circuit, 1986)[7/] and by the Second Circuit in Bozman v.

7/ The Stanley Court held that Shearer requires a case-by-case analysis of whether barring a claim serves the purposes of the Feres doctrine.

v. United States, 780 F.2d 198, 201 (2nd. Cir.)[8/]

Contrary to what appears to be the clear Rule established by this Court in Shearer, that each case is to be examined on a case-by-case basis, the Ninth Circuit has misinterpreted Shearer and has created a rule that a service member can be barred from bringing a claim against the United States by the Feres doctrine based solely on the generalization that his case is the type of case that may affect military discipline and effectiveness, without consideration of whether such affect was reasonably probable in this particular case.[9/]

8/ The Bozman Court held that Shearer rejects outright bright-line tests and requires that each case be analyzed for applicability of the Feres doctrine.

9/ In fact, the District Court specifically found that military decisions were not called into question by this case. (A. 11).

* * *

II THIS COURT'S DECISION IN UNITED STATES v. JOHNSON, SUPRA, IS BEING INTERPRETED TO MEAN THAT SERVICE MEMBERS CANNOT RECOVER UNDER THE F.T.C.A.

Because of this Court's recent decision in United States v. Johnson, supra, some Circuits are interpreting that case as outlawing any suit by any service member regardless of the aforementioned factors. Hopefully this misinterpretation of the Feres doctrine is seen in such recent cases as Atkinson v. United States, 813 F.2d 1006 (9th Cir. 1987), whose Petition for Certiorari is now pending before this Court. If 40 years of Feres litigation is to now be reduced to a broad-brush arbitrary rule that no service member under any circumstances can recover under the F.T.C.A. this Court should so state. If,

however, what this Court has stated for nearly 40 years is that the "incident to service" test is to turn on whether the maintenance of the F.T.C.A. suit will impede or hamper military command decisions, Certiorari is needed to set the record straight before further misinterpretations of the Feres doctrine such as BRIAN MILLANG's case or in Atkinson reoccurs.

It is hard to imagine how a selfless act of heroism such as that of BRIAN MILLANGs, done instinctively, in any way affects military discipline or the "incident to military service" test of Feres.

What BRIAN MILLANG did is something no military commander could have ordered him to do. It was a human-to-human gesture of selflessness.

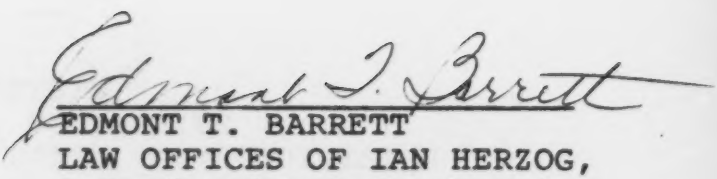
CONCLUSION

In Shearer this Court struck down all bright-lined rules and commanded a factual inquiry on a case-by-case basis centered on the impact of each claim on "essential military discipline." That is also the interpretation given by at least and Eleventh and Second Circuits. But the Ninth Circuit in this case has struck out a new course by misinterpreting the dictates of Shearer and by fashoning a rule that allows for dismissal of a service member's suit based on a generalization without regard for each individual case.

Therefore Petitioner respectfully requests that this Court grant Certiorari for the reasons set forth herein.

DATED: December 24, 1987.

Respectfully submitted,



EDMONT T. BARRETT
LAW OFFICES OF IAN HERZOG,
A Professional Corporation

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that I have this 26th day of December, 1987 mailed 40 copies of this Petition for Writ of Certiorari to the United States Supreme Court by placing copies of same in a properly addressed package to:

CLERK OF THE SUPREME COURT
OF THE UNITED STATES
SUPREME COURT BUILDING
1 FIRST STREET, N.E.
WASHINGTON, D.C., 20543.

Three copies of same were forwarded to counsel for Respondent and the Solicitor General on December 26, 1987 address as follows:

FREDDI LIPSTEIN/
ANTHONY J. STEINMEYER
APPELLATE STAFF, CIVIL DIVISION
ROOM NO. 3127
10th at PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C., 20530-0001;

HONORABLE CHARLES FRIED
SOLICITOR GENERAL OF THE U.S.
DEPARTMENT OF JUSTICE
WASHINGTON, D.C., 20530

by depositing same in the United States Mail, First Class.

Edmont T. Barrett

EDMONT T. BARRETT
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Los Angeles, CA., 90024

APPENDIX "A"

FILED
Nov. 15, 1985
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN MILLANG,	)	Case No. CV84-1295 MRP
Plaintiff,	)	
	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

This case was tried before the Honorable Mariana R. Pfaelzer on October 22, 1985. The Court, having found in favor of plaintiff, Brian Millang, and against defendant, United State of America, now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On Saturday, July 25, 1981, at a picnic area located in a park on the Marine Corps Air Station ("MCAS"), Tustin, California, plaintiff was run over and injured by a military police vehicle.

2. At the time of the accident, plaintiff was a Marine Corp Military Policeman who was off duty and attending a picnic on his leisure time.

3. The picnic was at a park which contained a non-military recreational vehicle (R.V.) overnight parking area.

4. On July 25, 1981 at approximately 4:00 P.M., an on-duty Military Police Officer, Sgt. Carlo G. Troiani, drove to the picnic area.

5. Upon arriving at the area, Sgt. Troiani got out of his vehicle, leaving the engine running. The vehicle was a three-quarter ton pick-up truck.

6. While Sgt. Troiani was out of his truck, an eighteen month old child,

Danny D. Meyers, son of Sgt. Douglas W. Meyers, walked over in front of Sgt. Troiani's military vehicle.

7. At the same time, some of the other picnickers gathered around Sgt. Troiani's truck.

8. At this time, plaintiff noticed Danny Meyers in front of Sgt. Troiani's truck. Plaintiff then moved to the place where Danny Meyers was playing.

9. Soon thereafter, one of the picnickers (not plaintiff) threatened to spray Sgt. Troiani with beer. In response, Sgt. Troiani hurriedly got into the truck, put it in gear and accelerated it forward.

10. Plaintiff, sensing the movement of the vehicle, threw Danny Meyers clear of the front of it. The vehicle, however, ran over plaintiff.

11. As a result, the right front of the vehicle collided with the plaintiff and its right side tires ran over part of

his body. Plaintiff was injured as a result. The child was thrown clear and not harmed.

12. Sgt. Troiani was acting in the course and scope of his military duties at the time of the accident.

13. Some time after this accident, plaintiff was honorably discharged from the military service and received a disability rating.

14. The picnic was attended by other servicemen with whom plaintiff was friendly, and their wives, children and guests. It was an informal gathering which included picnic games, food, soft drinks and beer. The picnic was not a military operation and attendance at it was not incident to or required by the military service. It was merely a friendly gathering, the food and drinks for which were purchased at an off-base grocery market, with money "chipped in" by some of the picnickers.

15. Plaintiff was a twenty-three year old Lance Corporal on the date of this accident. He was in excellent health before the vehicle ran over his back and spine. Plaintiff's medical bills to date have been paid by the Government and the Veteran's Administration.

16. Plaintiff received a disability discharge from the service. He will receive disability retirement benefits for the duration of his disability. These benefits will continue without regard to the award in this case. The award in this case represents plaintiff's net damages after reduction for the present and past value of those benefits as well as income taxes.

17. Plaintiff sustained the following injuries as a result of this accident:

a. Transverse Process Fractures, L-2, 3, 4 and 5, displaced.

b. Chronic low-back and left

hip pain aggravated by activity or weight bearing.

c. Lumbar disc syndrome including injured sacra-lumbar plexis (sciatica).

d. Permanent disability to back, hip and lower extremities.

18. Plaintiff has a life expectancy of 46.5 years.

19. Certain of plaintiff's physical functions are severely impaired and his physical handicap will not substantially improve with time.

20. Plaintiff's residual injuries include a permanent limp, sciatica, pain in his back, hip and lower extremities, and difficulty in sitting or standing in one position for any prolonged period of time.

21. Plaintiff had planned to remain in the military for four more years. He wished to remain in the military police in order to obtain embassy duty and related

training, including SWAT (special weapons and tactics) training. He intended, after leaving the service, to seek employment with a civilian police force. Before this accident, plaintiff liked to swim, hunt, ski, rock climb, and play softball, baseball and football. He cannot now engage in these activities without great difficulty.

22. Plaintiff is presently attending school to become a draftsman. Because of his physical condition, his ability to pursue that career in the long term is uncertain. Nevertheless, the calculation of the present value of Brian Millang's lost earning capacity assumes that he will work as a draftsman, taking into consideration his handicap and the medical evidence that he will never be able to do work which places any significant physical demands on him.

23. Plaintiff was not contributorily negligent. There is no basis for

applying any principal of comparative fault in this case.

24. The present value of the lost earning capacity suffered by plaintiff as a proximate cause of this accident, net of disability benefits, past and future, income taxes and other appropriate set-offs, credits and reductions, is $833,896. Plaintiff is awarded that amount. Further, damages for pain and suffering are awarded in the amount of $250,000, for a total award of $1,083,896.

25. To the extent that any Conclusion of Law are deemed to be Finding of Fact, they are hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. The proximate cause of this accident was the negligence of Sgt. Troiani, for which the Government, if it were a private citizen, would be responsible under California law.

2. The doctrine enunciated in Feres

v. United States, 304 U.S. 135, 71 S.Ct. 153 (1950), does not apply in this case. Plaintiff's attendance at the picnic was not an activity incident to his military service, nor did it involved the command functions of the military service. These functions were not involved in the picnic, nor was plaintiff's conduct in saving the child's life incident to his military duties.

As explained in Johnson v. U.S., 704 F.2d 1431, 1436 (9th Cir. 1983) (quoting Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980)), the primary purpose for the Feres Doctrine is:

> The protection of military discipline . . . serves largely if not exclusively as the predicate for the Feres doctrine . . . Only this factor can truly explain the Feres doctrine and the crucial line it draws. . . .

As the Supreme Court recently explained in United States v. Shearer, 105 S.Ct. 3039, 3043, 87 L.Ed 2d 38, 33 (June, 1985):

> The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed in Feres and subsequent cases. Here the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline.
> . . .
> The finding of negligence of the Government in this case did not require the Court to consider or evaluate any military decision. This was a traffic accident involving the negligent operation of a motor vehicle. Resolution of the liability issue here did not require Army officers to testify in court as to each other's decisions and action.

3. The negligence in this case occurred at a picnic held at a park attended by off-duty members of the military with their wives, children, friends and guests. Plaintiff's

activities at the picnic were not related to his military duties.

4. This park was open to wives, children and to non-military invitees. Plaintiff would have been allowed to attend the picnic at this location even if he were not in the military. In any event, the situs of this place of the accident is not controlling. Johnson v. U.S., supra, and United States v. Shearer, supra.

5. At the time of the Government's negligence, plaintiff was not acting pursuant to military orders. His activities bore no relationship to military activity. As such, this suit does not "second guess" command decisions; it does not encourage military personnel to question the decisions of their superiors, nor does it encourage military personnel to fail or refuse to follow orders. United States v. Shearer, supra.

6. In this case, compensation under the Federal Tort Claims Act would not affect the military command function or military discipline.

7. Whether a member of the armed services is engaged in an activity incident to military service is a question of fact to be determined from the circumstances of each case. Johnson, supra, at 1436.

8. Plaintiff is entitled to $833,896 as compensation for lost earning capacity and $250,000 as compensation for pain and suffering.

9. To the extent that any Findings of Fact are deemed to be Conclusions of Law, they are hereby incorporated into these Conclusions of Law.

DATED: November 13, 1985.

s/ MARIANA R. PFAELZER
Mariana R. Pfaelzer
United States District
Judge

APPENDIX "B"

FILED
Nov. 15, 1985
Clerk, U.S. District Ct.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN MILLANG	)	Case No.
	)	CV 84-1295 MRP
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	
	)	

This case was tried before the Honorable Mariana R. Pfaelzer on October 22, 1985. Following the trial, the Court found in favor of the plaintiff, Brian Millang, and against the defendant, United States of America, and awarded damages in the sum of $1,083,896.

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff, Brian Millang, and against the defendant, United States of America, in the sum of $1,083,896, together with plaintiff's costs of suit.

DATED: November 13, 1985.

s/ MARIANA R. PFAELZER
Mariana R. Pfaelzer
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brian Millang,	)	
	)	
Plaintiff-Appellee,	)	No. 86-5575
	)	D.C. No.
	)	CV 84-1295
v.	)	
	)	OPINION
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant.	)	
	)	

Argued and Submitted
January 6, 1987 -- San Francisco, California

Filed May 14, 1987

Before: J. Clifford Wallace, Charles Wiggins and Alex Kozinski, Circuit Judges.

Per Curiam

Appeal from the United States District Court for Central District of California Mariana R. Pfaelzer, District Judge, Presiding

SUMMARY

ARMED SERVICES AND VETERANS/ GOVERNMENTAL TORTS

Appeal from judgment. Reversed.

This action arises from injuries incurred by appellee Millang, a Marine Corps military policeman, while off-duty at a park on a marine corps air station. Millang was struck by a military vehicles being driven by an on-duty military police officer. Millang filed suit under the Federal Tort Claims Act. The district court awarded him damages finding that Feres v. United States, 340 U.S. 135 (1950) was inapplicable because Millang was off duty at a site where nonmilitary personnel were present.

[1] Feres prohibits the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. A claim that an on duty soldier acted negligently while discharging his responsibilities in an area subject to military control is the type of claim that

could well call military decisions into question. [2] Thus all the participants (including civilians) were subject to military statutes, regulations and orders. The totality of the circumstances leads to the conclusion that this accident arose out of activity incident to service.

COUNSEL

Ian Herzog, Los Angeles, California for the plaintiff-appellee.

Freddi Lipstein, Washington, D.C., for the defendant-appellant.

OPINION

PER CURIAM:

We consider whether an off-duty military police officer's suit for injuries suffered when he was run over by an on-duty military police officer at an on-base picnic site is barred by the doctrine of Feres v. United States, 340 U.S. 135 (1950).

FACTS

Appellee Brian Millang, a Marine Corps military policeman, attended a picnic on Saturday, July 25, 1981, at a park on a marine corps air station. The picnic was an informal gathering of servicemen, their families and guests. Millang was off duty at the time.

In the late afternoon Sergeant Carlo G. Troiani, an on-duty military police officer, drove his military police vehicle to the picnic site. Whether he arrived in response to an official summons or simply stopped by on his own is unclear from the record. Troiani stepped out of his vehicle, leaving the engine running, and spoke to some of the picnickers. Horseplay followed and someone threatened to spray Troiani with beer. Troiani rushed back to his truck, put it in gear and began to speed off. Unfortunately, an eighteen month old child had wandered in front of the vehicle. Millang, standing nearby, threw the child clear, but was himself run over by the truck.

Millang sustained severe injuries to his back and lower extremities. He received a disability discharge from the service and is entitled to government disability benefits for the duration of

his disability. His medical bills to date have also been paid by the government.

Millang brought suit against the United States for Troiani's negligence pursuant to Federal Tort Claims Act 28 U.S.C. §1346(b). The government claimed the suit involved an activity "incident to military service" and was thus barred by Feres. The district court disagreed, finding Feres inapplicable because Millang was off duty at a site where non-military personnel were present. In addition, the district court concluded that the suit did not involve the command function of military service and presented to threat to military discipline. Finding that Troiani was acting in the course of his military duty when the accident occurred, the court awarded Millang damages in the amount of $833,896 for lost earning capacity and $250,000 for pain and

suffering. The government appeals.

DISCUSSION[1]

The Feres doctrine deprives federal courts of subject matter jurisdiction to decide claims by members of the armed services where the injuries "arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146; Bon v. United States, 802 F.2d 1092, 1094 (9th Cir. 1986). The problem, of course, is determining which activities meet the somewhat elusive "incident to service" standard. While the courts may consider

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1/ Whether the Feres doctrine bars this suit is a question of subject matter jurisdiction, an issue of law reviewable de novo. Atkinson v. United States, 804 F.2d 561, 561 9(th Cir. 1986).

a variety of factors in making this determination,[2] the key inquiry is "whether the suit requires the civilian court to second-guess military decisions, ... and whether the suit might impair essential military discipline." United States v. Shearer, 105 S.Ct. 3039, 3043 (1985) (citation omitted); Atkinson v. United States, 804 F.2d 561, 563 (9th Cir. 1986). We conclude that Millang's claim is barred by Feres under this standard.

[1] Feres prohibits not only those suits that directly call into question military decisions, but also "the type of

---

2/ Relevant factors include the location of the accident, whether the participants were on duty when the accident occurred and the nature of the activities involved. See Bon, 802 F.2d at 1094.

claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectness." Shearer, 105 S.Ct. at 3044 (emphasis original). Although Millang does not specifically challenge a military decision in this case, a claim that an on duty soldier acted negligently while discharging his responsibilities in an area subject to military control is the type of claim that could well call military decisions into question. For example, there might well be an inquiry into whether Troiani was sent to the area by his superiors and why, a matter that is in fact in dispute here. Other plaintiffs bringing similar suits could allege inadequate supervision or training, requiring military personnel to defend their actions in court. Moreover, the military police have the express duty of enforcing military discipline. A lawsuit

that challenges the conduct of an on-duty military police officer acting within the scope of his authority on a military base also challenges the enforcement of military discipline. That is precisely what Feres sought to prevent.

[2] We find this case to be closely analagous to Bon, an opinion the district court could not have considered because it was rendered after the district court's decision. Bon held Feres barred a suit involving a boat accident between two military personnel on authorized liberty. Both boats were owned by the government and the accident occurred on or near a Navy Special Services facility. The court held the activity incident to military service:

> Bon enjoyed the use of the Special Services Center solely by virtue of her status as a member of the military and employees of the Department

> of Defense and their guests and dependents. Finally, the nature of the activity was such that its entire scope was subject to military orders and discipline. ... [T]he Special Service Center itself was directly under the control of the commanding officer. ...

802 F.2d at 1095. Likewise, Millang enjoyed the use of the picnic area solely by virtue of his status as a serviceman. Moreover, the accident took place in an area under the complete control of the commanding officer of the air station. Thus, all the participants (including civilians) were subject to military statutes, regulations and orders.[3] Troiani was driving a military vehicle and

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3/ As the court noted in Bon, it is not necessary to show actual physical control by a military superior or any specific violations of military regulations, only that the persons involved were subject to military control. 802 F.2d at 1095 n.4.

acting in the course of his duty. Whether he was summoned to the area or not, his actions while on duty were certainly subject to control by his superiors, directly involving the military command function. As in Bon, the totality of the circumstances leads to the conclusion that this accident arose out of activity incident to service.

Conclusion

This case is controlled by Bon. Even though plaintiff was engaged in off-duty recreational activity, his interaction on base with an on-duty serviceman acting in the course of his duty is the type of suit which may call into question military discipline and, as such, is barred by Feres.

REVERSED.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN MILLANG, Plaintiff/ Appellee, vs. UNITED STATES OF AMERICA, Defendant/ Appellant.	CV. No. 84-1295 MRP 9th Cir. No. 86-5575

PETITION FOR RE-HEARING (FRAP 40) and SUGGESTION FOR RE-HEARING EN BANC (FRAP 35)

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Rule 40(a), FRAP 1

1.0 RULE 40 CRITERIA

The Per Curiam unsigned opinion meets the criteria of Rule 40(a), FRAP, in the following respects:

1. The Court has misapprehended the holdings in United States vs. Shearer, 105 S.Ct. 3039 (1985) and Johnson vs. United States, 704 F.2d 143 (9th Cir. 1983), because it did not follow the rule of these cases that Feres prohibits only those "type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Shearer, 105 S.Ct. at 3044 (Emphasis in original). It ignored the District Court's conclusion that the negligence of a military person causing this traffic accident was the cause of BRIAN MILLANG's injuries as well as ignored the District Court's express finding that the sort of intrusive inquiry into military command functions proscribed by United States vs. Shearer, supra, and United States vs.

Johnson, supra, was not involved.

2. The Opinion misapprehends and misapplies the holding in Bon vs. United States, 802 F.2d 1092 (9th Cir. 1986), which by its own terms relied for its rationale on the existence of specific military rules and regulations governing the particular activity engaged in by the plaintiff in that case. By the government's own admission in this case, there are no such specific military rules and regulations governing BRIAN MILLANG's picnic activity. When asked at Oral Argument by this Appellate Panel, the Government had to admit there were no such specific rules. This is the same question asked and the same response given when this matter was tried by the District Court. Yet this Appellate Panel ignored the importance of their own question as well as the Government's crucial admission.

2.0 RULE 35 CRITERIA

The Per Curiam unsigned opinion meets the criteria of Rule 35(a), FRAP, and

a re-hearing En Banc should be ordered because consideration by the full Court is necessary to secure and maintain uniformity in its decisions for the following reasons:

1. The opinion does not comment on and fails to take into consideration other Ninth Circuit Feres opinions which if followed would compel a contrary result, Johnson vs. United States, 704 F.2d 143 (9th Cir. 1983), Roush vs. United States, 752 F.2d 1460 (9th Cir. 1985), Atkinson vs. United States, 804 F.2d 561 (9th Cir. 1986), Pet. for Re-Hrg. En Banc denied March 1987; it misapplies the teachings of Bon vs. United States, 802 F.2d 1092 (9th Cir. 1986) and United Stated vs. Shearer, 105 S.Ct. 3039 (1985); and ignores Feres cases currently pending before the United States Supreme Court, Stanley vs. United States, 786 F.2d 1490 (11th Cir. 1986) Cert. granted December 8, 1986 and United States vs. Johnson, 779 F.2d 1492 (11th Cir. 1986) (En Banc) Cert. granted October 6, 1986, decided May 18, 1987, __ U.S. __,

87 Daily Journal D.A.R. 2332.

2. The Opinion of the Court of Appeals conflicts with existing Ninth Circuit law and misapplies the Feres Doctrine by:

A. Paying lip service to the requirement of United States vs. Shearer, 105 S.Ct. 3039, 3034 (1985) that "the key inquiry in [Feres] is 'whether the suit requires the civilian court to second guess military decisions . . . and whether the suit might impair essential military discipline'" (Slip Opin. p. 4) and yet disregards the specific finding by the District Court that the Shearer factors were not involved and by glossing over the record which demonstrated that the District Court was clearly correct and not erroneous in expressly concluding that Shearer was satisfied.

B. Erroneously focusing on the

military status of the on duty military tortfeasor rather then on the activity of the victim/plaintiff as required by Johnson vs. United States, 704 F.2d 1431, 1436 (9th Cir. 1983) and recently repeated in United States vs. Johnson, ___ U.S. ___ 87 Daily Journal D.A.R. 2829 (May 19, 1987).

C. Mis-citing Bon vs. United States, 802 F.2d 10992 (9th Cir. 1986) which by its own terms relied for its rationale on the existence of specific military rules and regulations governing the actual activity engaged in by the plaintiff in Bon. There were no rules and regulations governing the picnic activity of plaintiff BRIAN MILLANG.

D. By stopping its Feres analysis at a finding that "all the participants (including civilians) were subject to [unspecified] military statutes,

regulations and orders" (Slip Opin. p. 5). If this truncated analysis were the law, no serviceman could ever recover against the United States under the F.T.C.A. because all servicemen are subject to Article 2 of the Uniform Code of Military Justice (U.C.M.J.) 10 U.S.C. §802, a proposition rejected by this Circuit in the aforementioned authorities, the United States Supreme Court in Shearer and rejected as well as in other Circuits, see for example, Woodside vs. United States, 606 F.2d 134, 141 (6th Cir. 1979).

3.0 ARGUMENT

3.1 BRIAN MILLANG'S ACT OF HEROISM NOT INCIDENT TO HIS MILITARY DUTIES

In this case, the Court in its Per Curiam opinion ruled that the selfless act of heroism by an off duty picnicker who saved the life of an 18 month old baby about to be run over by a reckless M.P.

driving a military truck was incident to his military service and barred by the Feres Doctrine. The Opinion bars BRIAN MILLANG's action despite the undisputed evidence that his spontaneous act of heroism could in no way interfere with military discipline or cause a civilian court to second guess military decisions.

If BRIAN MILLANG had not been so selfless and saved his own skin rather then saving the 18 month old child from certain death, the military parents of the 18 month old child could have sued for the wrongful death of their child. In coming to this extraordinary conclusion, the Court in Millang vs. United States was guilty of gross over generalization in an effort to construct a Feres bar rather than engage in the type of analysis required by case law.

3.2 FOCUS OF INQUIRY SHOULD BE ON THE NATURE OF THE ACTIVITIES OF PLAINTIFF AND NOT THE STATUS OF THE TORTFEASOR

The Court erroneously focuses on the status of the Government employee

Sergeant Troiani rather then on the nature of the activity of Plaintiff BRIAN MILLANG. In its Per Curiam opinion, the Court states:

> ". . . a claim that an on duty soldier acted negligently while discharging his responsibilities in an area subject to military control is a type of claim that could well call military decisions into question." (Slip Opin. p.4)

This speculative reasoning is wrong because no military decisions were involved and because it overlooks controlling case law. It ignores Johnson vs. United States, 704 F.2d 1431, 1436 (9th Cir. 1983) which teaches ". . . the nature of Plaintiff's activities at the time of the Government's tortious action . . ." should be the focus of the inquiry and not the status of the tortfeasor.

Johnson vs. United States, supra, is the seminal case in this Circuit on the Feres Doctrine. Johnson vs. United States,

supra, is discussed and approved in every other recent Ninth Circuit opinion dealing with Feres and is shockingly ignored by the Court in MILLANG. Also mysteriously missing is the progeny of Johnson, Roush vs. United States, 752 F.2d 1460 (9th Cir. 1982) and Atkinson vs. United States, 804 F.2d 561 (9th Cir. 1986).

The United States Supreme Court recently in United States vs. Johnson, ____ U.S. ____, 87 Daily Journal D.A.R. at 2330 (May 19, 1987) reaffirms the Ninth Circuit's Johnson vs. United States as the correct rule:

> ". . . this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the Doctrine. Nor have the lower courts understood this fact to be relevant under Feres. Instead, the Feres doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon [the

victim's] service-related injuries." (Emphasis added.)

Despite this, the Appellate Court in MILLANG ignores these well established principals and focuses on the status of Sergeant Troiani.

3.3 SERVICEMEN NOT BARRED UNDER F.T.C.A.

The net effect of Millang vs. United States is to say that no serviceman while on active duty, regardless of whether his activities are service related, can ever recover under the Federal Tort Claims Act. Although the Government frequently advocates this proposition before our Courts, no Court, up to now, has ever adopted it:

"In Brooks vs. United States, 337 U.S. 49 (1949), military personnel had been injured in a collision with an army truck while off duty. We rejected the Government's argument that those injured while enlisted in the military can never recover under the F.T.C.A." United States vs.

Johnson, dissenting opinion by Justice Scalia, 87 Daily Journal D.A.R. at 1332.

Pursuant to the Federal Tort Claims Act (28 U.S.C. 2671), a plaintiff cannot recover in any action unless the government employee involved was acting within the course and scope of his employment for the government. Therefore, if the on duty military policeman, Sergeant Troiani, had not been on duty at the time of this accident, Plaintiff could not sue the United States under the Federal Tort Claims Act.

But the Opinion in MILLANG, with "Catch-22" logic, says that because the government employee was on duty (a pre-requisite to bringing his action), the Plaintiff may not bring an action because it may potentially in some unspecified manner call into question military discipline and effectiveness.

By such reasoning, there could never be a case in which a serviceman can

sue the government under the F.T.C.A. It has never been the law that the Federal Tort Claims Act precludes a service member from bringing suits against the Federal Government, see 28 U.S.C. 1346(b) 2671 (1976), United States vs. Johnson and Brooks vs. United States, supra.

The MILLANG Opinion "legislated" the Federal Tort Claims Act out of existence for those of our citizens in uniform and rejected the analytical approach mapped out by the Ninth Circuit in Johnson vs. United States and approved by the Supreme Court in Shearer vs. United States.

3.4 BON MISAPPREHENDED AND MISAPPLIED

In its decision, the Court erroneously concludes that this case is "closely analogous to Bon." (Slip Opin. p. 5) Bon vs. United States, 802 F.2d 1092 (9th Cir. 1986).

However, the Court overlooks the critical point on which Bon turns. The Bon Court specifically found that Feres applied

only because the particular activity involved was subject to specific rules and regulations -- motor boating in federally owned and operated motorboats on a federal recreational area with specific rules and regulations governing the particular motor boating activity. In this case, however, the Government both before the District Court and the Court of Appeal conceded that there were no such specific rules and regulations governing the picnic activities nor the conduct of BRIAN MILLANG at the time of this accident.

This distinction is described in Bon as follows:

> "Finally, the nature of the activity was such that its entire scope was subject to military orders and discipline. Both Bon and the motorboat operator were subject to discipline for violations of the special services rules governing their use of its facilities and equipment. In addition, the Special

Service Center itself was directly under the control of the commanding officer of the San Diego Naval Training Center. In Johnson, the plaintiff was subject to military discipline only in the sense that members of the military are at all times subject to the orders of the commanding and superior officers. Here, however, Bon was subject to the military orders and regulations for the particular activity for which she was engaged. The presence of direct military control is sufficient to establish the activity as incident to military service." (Emphasis added) Bon vs. United States, 802 F.2d 1092, 1095-1096 (9th Cir. 1986).

Unlike Bon, there were no specific rules or regulations governing either this picnic activity or plaintiff BRIAN MILLANG's conduct.

The Court in MILLANG ignores this important distinction in Bon and rules that

virtually every servicemen is barred from recovery under the Federal Tort Claims Act no matter how remotely related his activities might be to his military service.

3.5 POLICY OF FERES IS TO AVOID CIVILIAN COURTS LITIGATING MILITARY COMMAND DECISIONS

In Johnson vs. United States, supra, the Ninth Circuit analyzed the parameters by which Feres allows actions brought by servicemen against the government under the F.T.C.A. The Court found the predominant feature to be:

> "The protection of military discipline . . . serves largely if not exclusively as the predicate for the Feres Doctrine . . . only this factor can explain the Feres Doctrine and the crucial line it draws . . ." 704 F.2d at 1436.

Shearer vs. United States re-emphasized this holding of Johnson and more particularly directed that consideration of

the "incident to service" test must be focused on whether the military command function will be hampered by the maintenance of a lawsuit. Shearer noted that case to be:

> ". . . quite different from Brooks vs. United States, . . . where the Court allowed recovery [to a serviceman] under the Federal Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of the vehicle, the claim here would require army officers 'to testify in Court as to each other's decisions and actions' . . ." (Citations omitted) 87 L.Ed.2d at 45.

The MILLANG case is very much like Brooks vs. United States, 337 U.S. 49 (1949), a case brought by a military person under the Federal Tort Claims Act for a simple traffic accident. No command decisions were involved either in Brooks or in MILLANG. Not one witness was called by

the Government during their case against BRIAN MILLANG. Not one witness was cross examined by either side concerning any military decisions. Military decisions were not involved directly or indirectly.

There was no need of "making the sort of intrusive inquiry into matters of military structure, supervision or discipline proscribed by Chappell vs. Wallace, 462 U.S. 296 (1983) and United States vs. Shearer, 105 S.Ct. 3039 (1985)", dissenting opinion by Pregerson in Louie vs. United States, 776 F.2d 819, 827 (9th Cir. 1985).

3.6 BRIAN MILLANG'S ACTIVITIES NOT INCIDENT TO MILITARY SERVICE

The Ninth Circuit noted in Johnson that the important line of inquiry determining the applicability of the Feres Doctrine is:

> ". . . the nature of the plaintiff's activities at the time of the government's tortious action . . . we must determine whether plaintiff's

admitted activities at the time of the negligence are the sort that would directly implicate the interest that the Feres Doctrine was designed to protect . . . 'whether a service member is engaged in an activity incident to service is a question of fact . . . to be determined from the circumstances of each case.' . . ." (Citation omitted) (Emphasis added.) 704 F.2d at 1436.

The Johnson Court then went on to say:

"The fundamental goal of the Feres Doctrine is to safeguard the military disciplinary structure from disruptive civil suits . . . [In] our view, then the most relevant line of inquiry is whether or not the service member's activities at the time of the injury are the sort that can harm the disciplinary system if litigated in a Civil Court." (Emphasis added.) 704 F.2d at 1439.

That is precisely where the Court has overlooked and misapprehended the law in this case. It has reached its decision based upon an analysis of the status of the government's employee at the time of plaintiff's injuries and has thereby ignored the "most relevant line of inquiry" -- the activities of the Plaintiff.

BRIAN MILLANG was off duty at the time of his injury and attending a picnic with his friends and their families. He was not performing any military duties, official or otherwise, at the time Sergeant Troiani ran him down.

Merely because Plaintiff was attending a picnic, which happened to be on base and was injured in an incident totally unrelated to his military service but rather related to his selfless "uncommandable" heroic act is not determinative of whether Feres should apply. Johnson vs. United States, 704 F.2d 1431, 1438 - 1439. Yet the Court in MILLANG used the coincidental happenstance

of this picnic on a military base as one of the major reasons for arbitrarily assuming that BRIAN MILLANG's injury was incident to his military service. This is a conclusion not born out by the facts and is contrary to modern Feres case law.

DATED: 5-27-87 THE LAW OFFICES OF IAN HERZOG
A Professional Corporation

BY: _____
IAN HERZOG,
Attorney for Plaintiff/
Appellee BRIAN MILLANG

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brian Millang,	)	
	)	
Plaintiff-Appellee,	)	No. 86-5575
	)	D.C. No.
	)	CV 84-1295
v.	)	
	)	ORDER
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: WALLACE, WIGGINS and KOZINSKI, Circuit Judges.

The panel as constituted in this case has voted to deny the petition for rehearing and reject the en banc suggestion.

The full court has been advised of this suggestion for en banc rehearing, and no judge of the court has requested a vot on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "F"

28 U.S.C. §2671

DEFINITIONS

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term --

"Federal Agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502,

503, 504, or 505 of Title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as devined in section 101(3) of Title 32, means acting in the line of duty.

ADMINISTRATIVE ADJUSTMENT OF CLAIMS

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: PROVIDED, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made

available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

DISPOSITION BY FEDERAL AGENCY AS PREREQUISITE; EVIDENCE

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall at the option of the claimant any time thereafter, be deemed a final denial of the claim for

purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

JUDGMENT AS BAR

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. §2677

COMPROMISE

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 U.S.C. §2678

ATTORNEY FEES; PENALTY

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

EXCLUSIVENESS OF REMEDY

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suites against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation of any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject

matter against the employee of his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate supervisor or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and

to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of

this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. §2680

EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of section 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States

(g) Repealed.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: PROVIDED, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Supreme Court, U.S.
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(2)

No. 87-1077

In the Supreme Court of the United States

OCTOBER TERM, 1987

BRIAN MILLANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former serviceman, contends that the court of appeals misapplied *Feres* v. *United States*, 340 U.S. 135 (1950), by holding that he is barred from suing under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, to recover for an injury he sustained, while off duty, in an accident that occurred on a military base and was caused by an on-duty serviceman.

1. Petitioner, while stationed at the Marine Corps Air Station in Tustin, California, was hit by a truck driven by an on-duty military policeman. Petitioner was off duty and at a picnic on the base at the time of the accident. He sustained back injuries. Pet. App. A2-A5. Petitioner sued the government

under the FTCA and the district court rendered judgment in petitioner's favor in the amount of $1,083,896 (*id.* at A14). The district court rejected the government's contention that petitioner's claim is barred by *Feres* because, in the district court's view, the trial did not require testimony by or against superior officers and did not otherwise disrupt military discipline (*id.* at A8-A12).

The Ninth Circuit reversed (Pet. App. A15-A26). The court of appeals recognized that "*Feres* prohibits not only those suits that directly call into question military decisions, but also 'the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effect[ive]ness.' " *Id.* at A22-A23 (quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985) (emphasis in original)). The court considered a variety of factors, including the location of the accident, whether the participants were on duty when the accident occurred, and the nature of the activities involved (Pet. App. A22 n.2), and concluded that petitioner's action involved "the type of claim that could well call military decisions into question" (*id.* at A23). The court noted specifically the critical allegation of petitioner's case — "that an on duty soldier acted negligently while discharging his responsibilities in an area subject to military control" (*ibid.*). The court also noted that petitioner has been receiving disability benefits and is entitled to such benefits for the duration of his disability, and that the government paid his medical bills (*id.* at A20).

2. The court of appeals' decision is correct and further review is not warranted. Petitioner misunderstands the standard this Court established in *Shearer*. As the court of appeals explained, *Shearer* does not require a case-by-case inquiry into the

impact of the particular litigation on military discipline and effectiveness, but instead requires determination whether the litigation of cases of particular types would, if generally permitted, undermine military discipline and effectiveness. This case presents such a claim, as the court of appeals concluded, since petitioner alleges that a military policeman negligently performed his duties on a military base, injuring another serviceman.

This Court's recent decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), plainly supports the decision below. The Court there reaffirmed that analysis of the *type* of claim at issue was warranted and noted that "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (slip op. 9 (footnote omitted)). It also stated that the existence of generous statutory disability benefits, such as petitioner has received and is receiving, "is an independent reason why the *Feres* doctrine bars suit for service-related injuries" (slip op. 8).*

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* Petitioner's view finds no support in two of the cases on which he purports to rely. The Eleventh Circuit's decision in *Stanley* v. *United States*, 786 F.2d 1490, 1499 (1986), which petitioner cites (Pet. 15), was reversed by this Court, No. 86-393 (June 25, 1987). The Second Circuit in *Bozeman* v. *United States*, 780 F.2d 198 (1985), which petitioner also cites (Pet. 15-16), held that *Feres* barred the claim of an off-duty serviceman injured after a club on a military base served alcoholic beverages to servicemen who were obviously drunk. It thus supports the court of appeals' judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1988